MICHAEL RODAK, JR., CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-973

THE DUNLOP COMPANY, LIMITED, *Petitioner*

v.

KELSEY-HAYES COMPANY, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITIONER'S REPLY BRIEF

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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Petitioner respectfully submits this brief reply to respond to some of the misleading statements in Respondent's Brief in Opposition and to focus attention on the sole issue *now* before the Court: Should a writ of certiorari be granted.

In petitioner's view, respondent has submitted a contentious and detailed statement of its version of the facts that might be appropriate for a brief on the

merits once the Court has agreed to review this case. It seems entirely out of place in a brief that ought to be directed only to the question of whether the Court should grant the requested writ.

Petitioner has raised three questions in its petition that warrant the grant of the writ:

1. How is Section 102 of the Patent Act of 1952, 35 U.S.C. § 102, to be interpreted? Subsidiarily, can individually incomplete experimental devices be cumulated to form the "anticipation" of an invention that bars the grant of a patent pursuant to Section 102? This is an important, novel question of federal law never answered by this Court and, in petitioner's view, erroneously decided by the courts below.

2. Must the courts (and the Patent Office) give consideration to expressions of public policy as are found in highway safety legislation when they are interpreting the Patent Act as it is applied to inventions affected by such laws? This is an issue of public concern and continuing significance as to which this Court should provide much-needed guidance.

3. Are patentees regularly prevented from asserting their patent rights against the automobile industry in the courts of the latter's home Circuit, the Sixth, due (perhaps subconsciously) to considerations unrelated to the merits of their inventions? The statistics suggest it; affected parties believe it. This is a matter concerning the administration of justice in the federal courts which this Court has an obligation to review.

With respect to the first question, in petitioner's judgment this is not the time or place to dispute respondent's characterization of the evidence presented

at trial concerning the quality and completeness of the so-called "Goodyear work." Suffice it to say that petitioner believes this Court would not, upon a review of the entire record, find respondent's summary complete or accurate. But it is undisputed that Goodyear abandoned its work before it provided either the public or industry with any contribution to the important art of braking automobiles. Dunlop made that contribution. Whether Dunlop should now be denied its limited rewards therefor in this country will depend upon a careful assessment of an extensive record. Dunlop claims, however, that that record can only be reviewed in the light of a proper legal standard. The lower courts certainly did not apply one. And this Court has not set one under 35 U.S.C § 102. The old decisions of the Supreme Court cited by respondent, from different eras, under different statutes and in different fields of technology, do not provide the standards petitioner urges this Court to establish now.

Respondent's objections to petitioner's second issue misconceive the point. Petitioner itself recognized that 1966 legislation, much less 1974 regulations, relating to highway safety cannot literally set the proper legal standard by which the utility or completeness of inventions of the 1950's (or anticipations of the 1940's) are to be judged. (Pet. p. 13). But such laws can and do properly indicate a growing public concern about what minimal limits of utility and completeness should be applied before any government agency or court may call a "brake" a "brake." This is an issue of recurring importance that petitioner thinks this Court should address. This case provides the opportunity to do so—however the Court may ultimately determine whether any particular parameter of the highway safety laws can be invoked to pre-

vent Hawley's device from being called an anticipatory "brake."

Finally, respondent has not contested petitioner's third issue with any facts disproving the claim of consistent lack of patentee success in suits against the Big Four automobile companies in the courts of the Sixth Circuit. The statistics petitioner has presented in its petition speak for themselves. It is no "unjustified affront to the Court below" (Resp. p. 16) to ask this Court to review those facts. It might be an "affront" to the sense of justice this Court must guard to ignore them.

Wherefore, petitioner respectfully requests this Court to grant its petition for a writ of certiorari.

Respectfully submitted,

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